

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JEFFREY FRANKLIN,

Petitioner,

v.

ROBERT LeGRANDE, et al.,

Respondents.

Case No. 3:13-cv-00714-MMD-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, by a Nevada state prisoner.

The petition in the instant action challenges petitioner's state conviction in the Eighth Judicial District Court for the State of Nevada, Case No. C215549. Petitioner previously challenged this same conviction in this Court, filed under case number 3:10-cv-00020-HDM-VPC. The petition in case number 3:10-cv-00020-HDM-VPC, which raised the same issues asserted in the instant petition, was reviewed on the merits and denied by order filed January 30, 2013. (Dkt. no. 25 in 3:10-cv-00020-HDM-VPC.) Judgment was entered that same date. (Dkt. no. 26 in 3:10-cv-00020-HDM-VPC.) Petitioner appealed. By order filed May 23, 2013, the United States Court of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability. (Dkt. no. 30 in 3:10-cv-00020-HDM-VPC.)

"Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

1 Pursuant to 28 U.S.C. § 2244(b)(1), “[a] claim presented in a second or successive
2 habeas corpus application under section 2254 that was presented in a prior petition
3 shall be dismissed.” The instant petition is a successive petition, which requires
4 petitioner to seek and obtain leave of the Ninth Circuit Court of Appeal to pursue. See
5 28 U.S.C. § 2244(b)(3) *et seq.* In the prior federal habeas case in which petitioner
6 challenged the same conviction (Case No. 3:10-cv-00020-HDM-VPC), this Court
7 reviewed the merits of the petition and denied the petition by order filed January 30,
8 2013. Because the prior habeas corpus petition was decided on the merits, and the
9 instant habeas petition asserts those same claims, the instant petition is a successive
10 petition. *McNabb v. Yates*, 576 F.3d 1028, 1029 (9th Cir. 2009). Petitioner has not
11 presented this Court with proof that he has obtained leave to file a successive petition
12 from the Ninth Circuit Court of Appeals. Therefore, the instant petition will be dismissed
13 as successive.

14 In order to proceed with any appeal, petitioner must receive a certificate of
15 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v.*
16 *Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006); see also *United States v. Mikels*, 236
17 F.3d 550, 551-52 (9th Cir. 2001). District courts are required to rule on the certificate of
18 appealability in the order disposing of a proceeding adversely to the petitioner or
19 movant, rather than waiting for a notice of appeal and request for certificate of
20 appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
21 Cases. Generally, a petitioner must make “a substantial showing of the denial of a
22 constitutional right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);
23 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that
24 reasonable jurists would find the district court’s assessment of the constitutional claims
25 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold
26 inquiry, the petitioner has the burden of demonstrating that the issues are debatable
27 among jurists of reason; that a court could resolve the issues differently; or that the
28 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,

1 no reasonable jurist would find this Court's dismissal of the petition debatable or wrong.
2 The Court therefore denies petitioner a certificate of appealability.


3 It is therefore ordered that this action is dismissed without prejudice as a
4 successive petition.

5 It is further ordered that all pending motions, including petitioner's motion to
6 proceed *in forma pauperis* (dkt. no. 1) and motion for the appointment of counsel (dkt.
7 no. 1-2) are denied.

8 It is further ordered that petitioner is denied a certificate of appealability.

9 It is further ordered that the Clerk shall enter judgment accordingly.

10 DATED THIS 17th day of April 2014.

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14 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE
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